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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-735

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
Petitioner,

vs.

DOW CHEMICAL COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, the Dow Chemical Company, respectfully prays that this Court decline to issue a Writ of Certiorari

to review the Decision of the United States Court of Appeals for the Fifth Circuit in Case No. 72-1369, styled Dow Chemical Company v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, et al, affirming a strike damage judgment of the United States District Court for the Middle District of Florida, Tampa Division, in favor of the Respondent.

OPINIONS BELOW, STATEMENT OF JURISDICTION AND STATUTES INVOLVED.

The Respondent concurs in the Petitioner's statements as to these matters.

QUESTIONS PRESENTED

The Respondent takes exception to the Petitioner's statement of its Question No. 1 under the heading of Questions Presented (P. 3).[1]

The question first stated under that number is:

> "Whether damages because of a 27-day strike in violation of a labor agreement may include *losses incurred before that strike commenced* as well as losses during the period of a concededly lawful 45-day strike after the expiration of the agreement?"

The Respondent will demonstrate, *infra*, that no damages were awarded to it for any losses incurred by it

[1]The abbreviation "P" is used herein to refer to the Petition; the abbreviation "A" is used to refer to the Appendix attached to the Petition.

prior to the time when the Petitioner's unlawful strike activity began, and that this is plain beyond argument from the District Court's opinion. The words italicized above therefore render the question as stated inappropriate for review, inasmuch as they make the ultimate question one that was never presented to or decided by the District Court or the Circuit Court of Appeals.

The question as alternatively stated under the first number is:

> "Alternatively, whether damages awarded *for the lawful strike* infringed on an area of labor combat that Congress specifically designed to be free and unobstructed?"

This is not a truly alternative statement of the question as first presented. The question as first presented refers to the fact, which is true, that the damages award includes losses, attributed to the unlawful strike, which were continuing to occur "during the period" of a lawful strike that commenced some weeks after the unlawful strike was terminated. But the question as alternatively presented subsumes a different fact, which is not true, *i.e.*, that damages were awarded "for the lawful strike."

The Respondent will demonstrate, *infra*, that the District Court did not award it any damages for, or occasioned by, the lawful strike and that this so so clear from the record as to preclude argument. Therefore, the alternative question, like the question as first stated, is one that is inappropriate for review because it is a question that was never considered or decided below.

By way of explanation, the District Court found that the amount awarded reasonably represented damages caused specifically by the unlawful strike of January 2-February 7, 1965, for which the Petitioner now admits liability; by an unlawful one day strike on December 30, 1964, for which the Petitioner also now admits liability; and included recovery of the Respondent's legal expenses incurred in bringing the strike of January 7, 1965, to an end (See A. 35a-36a). The parties agreed, and the District Court found, that the Respondent was not entitled to recover any damages resulting from the lawful strike of March 15, 1965, and the Court expressly eliminated such damages from the amount awarded, accepting the Respondent's evidence and calculations as to the relative operational and dollar impacts of the two strikes for that purpose (A. 25a-26a).

It is therefore most inaccurate for the Petitioner to assert by the content of its first question presented that either the District Court or the Circuit Court of Appeals held that damages resulting from a lawful labor strike are recoverable in an action to recover damages resulting from a prior unlawful strike, where the adverse effects of the unlawful strike are continuing to cause damages during the period of the ensuing lawful strike.

For the reasons set forth hereinabove, the Respondent respectfully submits that the Petitioner's questions presented for review are not expressed in the terms and circumstances of this case, as required by Rule 23(1)(c), Supreme Court Rules, and that the Petition should therefore be denied as to Question No. 1 without further consideration.

The Respondent does not take exception to the facts assumed in the Petitioner's subsidiary Questions Nos. 2 and 3, but submits that these questions merely present subsidiary aspects of the issue sought to be raised in Question No. 1, and that they do not warrant independent consideration.

COUNTERSTATEMENT OF THE CASE

The Petitioner's Statement Of The Case contains a substantial number of factual assertions which are at times inaccurate and at other times susceptible of being prejudicially misunderstood. The Respondent wishes to use its privilege of submitting a counterstatement for the purpose of inviting the Court's attention to these matters, after briefly describing the aspects of the case which are pertinent to this proceeding.

As the Petitioner states, this case arose when the Respondent sued the Petitioner for damages suffered on account of an unlawful labor strike occurring at the Respondent's Tampa, Florida, manufacturing plant from January 7, 1965, through February 2, 1965.[2] In the Circuit Court of Appeals, the Petitioner admitted the unlawful nature of this strike, and its liability for all damages attributable to it, for purposes of this litigation (A. 3a).

Relying upon the testimony of the Respondent's managerial operating personnel who were present in the plant before, during and after the occurrence of this unlawful strike; upon the testimony of a defense expert who agreed

[2]The Respondent also recovered damages for a one-day unlawful strike occurring on December 30, 1964, and for legal expenses incurred in enjoining the January strike, but these elements of damages are not in issue in this proceeding.

that the effects of a general labor strike must normally be expected to outlast the strike itself; upon the testimony of the Respondent's Comptroller; and upon corroborating documentary evidence contained in the plant's operating records, the District Court found that the Respondent continued to suffer damage from the unlawful strike at least throughout the first six months of 1965 (A. 23a-24a).

During this six-month period, referred to in the District Court's findings as the unlawful strike-affected period, on March 15, 1965, the Petitioner called a second and lawful strike against the Respondent.

Although this second, or lawful, strike continued until April 29, 1965, as indicated by the Petitioner, it continued for that length of time only in the sense that Union pickets continued to walk in front of the plant until April 29. The District Court found that this strike was in fact ineffective, due to a lack of support for it among plant employees, and due to a revised operating method that the Respondent utilized as the result of contingency planning that it was able to do during the negotiating period preceding the second strike (A. 25a-26a). The Petitioner in fact abandoned this second strike effort in April without securing any objective by it (A. 26a).

During the trial of this case, the Respondent introduced into evidence practically all of its operating records and statements for the years 1964 through 1966, and produced testimony by its operating personnel as to the comparative impact on operations, costs and revenues of the two strikes. The District Court found that the testimony and the records were mutually supportive (A. 26a). On the basis of this testimony and these records, the Respond-

ent's Comptroller prepared and introduced into evidence a calculation of damages attributable solely to the unlawful strike.

In making his calculation, the Comptroller first determined that the last six months of 1965 constituted a representative period of normal operations. He then used actual cost figures achieved by the plant during this period, and production and sales estimates made by qualified Dow personnel in the normal course of business, to calculate what the plant's costs and revenues would have been during the first six months of 1965 in the absence of any strike.

The Comptroller then arrived at an estimate as to the comparative impact of the second or lawful strike through consultation with plant operating personnel and operating records. On the basis of this information, he arrived at the conclusion that any adverse affect attributable to the lawful strike would be eliminated from the damages calculation if the figures representing production actually achieved during April and May were adjusted upward as if the plant had continued, during those months, to recover production capability at the rate previously established. This projection yielded a figure of 169,291 pounds to be added to actual production for the first six months to offset any effect attributable to the abortive legal strike, an amount which exceeded production actually achieved during any one of these months.

At this point, the Comptroller proceeded to split the adjusted costs figure for the strike-affected six month periods into fixed and variable costs. Then, using the fixed cost-per-pound figure achieved during a normal operating period, he calculated the amount by which fixed costs were

excessive during the first six months of 1965 due to the unlawful strike. This figure represented the amount of revenue that would have, in the absence of the unlawful strike, been available to help absorb fixed costs, but which was unavailable on account of that strike because of lowered production.

For the second element of his damages calculation, the Comptroller subtracted total fixed costs for the strike-affected period from total costs, to yield total variable costs. He divided this figure by the number of pounds produced to get the strike-affected variable cost per pound. He subtracted from this figure the variable cost per pound figure achieved during normal operations, to get the amount by which the variable cost per pound was excessive during the first six months of 1965 due to the unlawful strike. He then multiplied this figure by pounds produced during the first six months to get the total amount by which variable costs were excessive due to the unlawful strike.

The damages award consists of the sum of these two figures, representing variable costs to the extent rendered excessive by the January strike plus that part of fixed costs made unrecoverable by it.

The District Court found that all of the figures and projections used by the Comptroller in calculating damages were reasonable and supported by documentary evidence as well as by the testimony of operating personnel (A. 29a-30a), and the Circuit Court of Appeals was "extremely confident" that the trial court's conforming findings of fact were substantially supported by record evidence (A. 3a).

The Petitioner at trial offered no calculation of damages of its own beyond a calculation by an accountant who testified that he limited the strike-affected period to ten days, doing so arbitrarily and without interviewing any witnesses or reviewing the materials developed during discovery (A. 24a). Neither did the Petitioner offer any calculation as to the comparative effect of the legal strike.

The Respondent considers it appropriate at this point to invite the Court's attention to the defects in the Petitioner's Statement Of The Case referred to earlier.

In the second paragraph at page 4 of the Petition, the statement is made that the Respondent's plant lost money during every year prior to 1965. This is untrue. As the District Court's opinion confirms (A. 10a-12a), the plant was operating profitably during the first quarter of 1964, voluntarily went into a loss situation for the ensuing six months in order to accomplish an ambitious program of expansion, capital additions and retooling, and returned to profitability during the last quater of 1964. More specifically, the evidence was that the plant showed a profit of $48,387.00 for January-June, 1964; $5,800.00 for July-December, 1965; $48,429.00 for January-June, 1966; and still better profits for September and October of 1966.

In the same paragraph, the Petitioner states that there was a 12-month operating loss of $291,545 in 1965. As is apparent from the profit figure of $5,800.00 for the second half of that year, this loss occurred in its entirety during the strike-affected period.

The Petitioner's further statement in the same paragraph that Dow decided to close the plant in early 1966

because of the unprofitable nature of the business is deceptive. As the District Court's findings show (A. 8a), the plant was sold in 1968, not 1966. The testimony was that Dow made the *decision* to get out of the blown bottle business in 1966, but did not sell this plant until 1968. The testimony was, further, that "the business" as a whole, consisting of several plants around the country, was unprofitable, but that the Tampa plant was itself profitable.

In the first complete sentence at the top of page 5, and again on page 6, the Petitioner states that the damages award includes losses sustained during the first week of January, 1965, before the unlawful strike commenced. As is apparent from the District Court's opinion, and the explanation of the damages calculation given herein, this is not the fact. Damages were calculated by comparing actual operating figures for a given six-month period during which an unlawful strike occurred with a well supported projection of what those figures would have been in the absence of the unlawful strike. Thus, only damages attributable to the unlawful strike were claimed and awarded.

The Petitioner's statement at the same point that the damages award includes losses for the 45-day period of the lawful second strike should be qualified by the observation that damages were awarded only for the continuing effects of the prior unlawful strike, since the award includes an adjustment to offset the effect of the lawful strike.

In the first full paragraph on page 5, the Petitioner refers to the finding of the District Court (A. 25a),

affirmed on appeal, that the Respondent was forced to engage in a massive program of machinery repair in June of 1965 due to problems that had their genesis in the period just after the commencement of the unlawful strike when the Respondent was forced to subject the machinery to unusual stresses in order to train new employees and try to get production for its customers and was unable to apply proper maintenance.

Since this repair program practically brought the plant to a halt, and was attributable to the effects of the unlawful strike, the Court did not adjust the actual production figures for June on account of the legal March strike (A. 26a).

The District Court's finding as to the month of June was therefore not, as the Petitioner states, inconsistent with its making of allowances for prior months to offset the effects of the legal March strike.

The Petitioner's assertion (P. 6) that production costs and operating losses were at their worst during the period of the legal strike is simply inaccurate. The evidence showed that January and February were by far the worst months, with production then at 82,061 and 88,589 pounds as compared with 141,030 and 125,607 pounds for March and April. March was the second best, and May the best (146,102 lbs.) production month of the six.

The Petitioner's assertion that damages in the form of unrecovered fixed costs can be experienced only when an employer is receiving no return whatsoever from productive labor (P. 6, second paragraph, Item No. 4) is un-

tenable on its face. It is plain that a manufacturing operation suffers damage when the total fixed costs outlay remains constant and the number of units produced decreases due to an unlawful strike, regardless of how many hours per day the plant operates.

The Petitioner's statement (P. 6, next to last line) that the District Court made a ruling that the second strike was bound to have had a new impetus on damages is inaccurate. No such ruling appears in the District Court's opinion, and the statement relates merely to a passing thought expressed by the trial judge before the evidence relating to the comparative impacts of the two strikes was presented, including the evidence that supported the finding that the legal strike was abortive and ineffective.

The Petitioner's statement that the only evidentiary attempt to separate losses attributable to the two strikes was the submission of an exhibit summarizing operating margins for January, February and the first half of March (P. 7, first complete sentence) is also inaccurate. The District Court's opinion (A. 26a) shows clearly that Respondent's Comptroller submitted the calculation described in this brief, *supra*, for eliminating losses suffered on account of the legal strike from the amount of damages claimed, and that this calculation was based upon the direct testimony of Respondent's operating personnel who were present in the plant at all pertinent times and observed the impacts of the two strikes on operations at first hand, with this testimony being supported and corroborated by the plant's operating records and the Comptroller's financial records. This evidence was totally uncontradicted. The exhibit that the Petitioner refers to was an alternative

exhibit, submitted in case the District Court should find a shorter damages period than that for which Respondent contended.

The Petitioner's ensuing statement that the figure of $119,344 reflected by this exhibit was the amount of losses actually claimed for the January strike (P.7, first full paragraph) is a gross misrepresentation. As the opinions of the District Court (A. 23a-24a) and the Circuit Court of Appeals (3a) both show, the Respondent at all times claimed that the unlawful strike caused damages at least through the month of June, 1965.

The Petitioner's statement that the allowance for the March strike, as calculated by Respondent's Comptroller and accepted by the District Court, resulted in a reduction in the damages figure for excess production costs of only $246.00 is again untrue. The allowance resulted in the $246.00 reduction in the amount claimed for *variable* production costs made excessive by the unlawful strike. This is so because unit variable cost, by definition, does not decrease on account of increased production. As production increases, the total variable costs figure also increases because it takes aditional raw materials, labor, etc. to produce the additional units. Therefore, when the Comptroller projected that an additional 169,291 pounds would have been produced but for the legal strike, the damages figure reflecting excessive variable costs was not materially affected. However, this projection did materially affect the damages claimed for reduced ability to offset fixed costs due to lowered production as a result of the unlawful strike, reducing the amount claimed therefore by $30,438.52.

ARGUMENT

THE PETITION SHOULD NOT BE GRANTED BECAUSE IT IN ACTUALITY SEEKS MERELY TO DISPUTE FINDINGS OF FACT MADE BY THE DISTRICT COURT AND AFFIRMED BY THE CIRCUIT COURT OF APPEALS, AND DOES NOT SHOW THE EXISTENCE OF ANY CONFLICT AMONG THE CIRCUITS, UNSETTLED FEDERAL QUESTION, DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS, OR OTHER SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD CONSIDER THE CASE.

The Respondent submits that a comparison of the Petitioner's Questions Presented with the opinions of the Courts below as referred to and discussed, *supra*, demonstrates quickly and clearly that the Petition amounts in sum to an effort to present to this Court a factual dispute thinly disguised as an unsettled question of federal law.

The Petitioner's argument proceeds upon the premise that the Courts below included damages caused by its legal strike of March 15, 1965, in their award of damages caused by the unlawful strike of January 7, 1965, despite the fact that the District Court explicitly found as a fact and the Circuit Court of Appeals explicitly affirmed the finding, that the amount awarded represented damages caused by, and only by, the unlawful January strike.

It is apparent that the Petitioner's real argument is that the District Court's separation of damages attribut-

able to the two strikes is factually wrong, for it is an undeniable certainty that the separation was made.

The question thus presented is not one of unsettled federal law, but one of fact.

The question phrased as "I." under "Reasons For Granting The Writ" in the Petition, *i.e.*, whether damages for an illegal strike "may encompass losses caused by a lawful strike period occurring" thereafter has never been an issue and is not now present in this case, inasmuch as the Respondent has never before advanced that contention and neither Court below has so held. The pre-trial stipulation in fact provided in part that damages attributable to the March strike would not be recoverable.

This Court has made it plain that the "special and important reasons" required by Rule 19 for the issuance of a writ of certiorari relate to problems beyond those which are merely episodic, and that its certiorari jurisdiction is reserved for those cases involving legal principles of importance to the public generally, as distinguished from cases which are of importance to the immediate parties only. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70.

The question whether the District Court properly separated damages attributable to the two strikes in this case would appear to be a classic example of a problem which is merely episodic and a quarrel which is of no importance to anyone but the parties.

SINCE THE PETITIONER DID NOT CAUSE THE RECORD BELOW TO BE TRANSMITTED TO THIS COURT, THE PETITION MUST REST UPON THE OPINIONS BELOW AS WRITTEN, AND THESE OPINIONS SHOW THAT THE ISSUES CLAIMED BY PETITIONER DO NOT EXIST.

Although the Petition contains numerous assertions of fact, many of which the Respondent flatly contradicts in its Counterstatement, *supra*, the Petitioner has not availed itself of its privilege, under Rule 21 of this Court's Rules, to have the record below certified and transmitted to this Court. None of the Petition's assertions is supported by a citation to any source other than the opinions of the Courts below.

This necessarily leaves the case in a posture where all contentions presented must be resolved by reference to the opinions of the District and Circuit Courts.

There is nothing in either of these opinions to show the existence in this case of any of the issues referred to in the Petitioner's Questions Presented or Reasons For Granting The Writ.

Whereas Petitioner's Question No. 1 suggests that the lower Courts included damages caused by a lawful strike, and antecedent losses, in an award for damages due to an unlawful strike, the opinion of the Circuit Court of Appeals expressly stated that the award, as affirmed by it, was based upon "reasonably anticipated sales as well as . . . fixed and variable production costs as adversely affected by the January strike, . . . " The District Court's

opinion precisely described the approved damages calculation, describing in detail the means by which all effects of the lawful strike were excluded from the damages award (A. 25a-26a), and finding terms that the amount awarded was only for damages caused by the unlawful strike.

In its Question No. 2, the Petitioner attempts to present a legal argument that damages in the form of excessive unrecovered fixed costs cannot occur when plant operations are occurring on a full-time basis, regardless or how badly crippled the plant may be, or what part of normal production may be lost. The Respondent has argued, *supra*, that this argument is unsupported by logic, in the Petition or otherwise. It is further true that no such issue was ever made or presented below, so that the question cannot be presented here. *Ellis v. Dixon*, 349 U.S. 458.

The Petitioner's Question No. 3 attempts to raise a question as to whether the evidence below was sufficient to support the District Court's apportionment of damages as between the lawful and the unlawful strikes. Apart from the argument that such a question presents no special or important reason for the exercise of certiorari jurisdiction, it is apparent that the Petitioner's contention that such a question is viable cannot be supported in the absence of the record below, since the Petitioner's underlying assertions are factual in nature and are controverted by the Respondent.

In any event, neither of the Courts below has held that the damages award could include any monies for damages attributable to the lawful strike. The question therefore amounts to an effort to have this Court determine whether a well-settled rule of damages was correctly

applied in a particular case, there being no dispute as to the law itself. Research reveals no instance in which this Court has exercised its certiorari jurisdiction to review such a routine question.

IF THE PETITION BE REGARDED AS RAISING AN ISSUE AS TO WHETHER A COURT MAY RELY UPON PROJECTIONS OR ESTIMATES, BASED UPON RELIABLE INFORMATION AS TO RELEVANT FACTORS, IN ASSESSING DAMAGES ATTRIBUTABLE TO AN UNLAWFUL STRIKE, THAT QUESTION HAS BEEN CLEARLY SETTLED BY THIS COURT, AND THE PETITION SHOWS NO CONFLICT OR DEPARTURE FROM THIS COURT'S HOLDING AMONG THE CIRCUITS.

Upon total reading, it appears that the thrust of the Petitioner's complaint to this Court is that the Courts below erred in failing to accept its argument that the mere calling of a lawful strike, when damages emanating from a prior unlawful strike are still occurring, must in all cases operate to truncate the injured party's otherwise continuing right to damages because of risk of uncertainty as to the true cause of ensuing damage. Apparently, the Petitioner would so argue regardless of whether the intervening strike were found to be one of moment, or, as the Courts below have found in this case, one that was abortive, ineffective and subsequently abandoned.

If this is the Petitioner's position, then the Petition must surely fail, in view of this Court's long-standing holding to the precise contrary in *Story Parchment Co. v.*

Patterson Paper Company, 282 U.S. 555. In this case, cited by the District Court in its opinion (A. 34a), this Court dealt with the position advanced here by the Petitioner in a few concise lines:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.
>
> * * *
>
> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be ascertained by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise (citing case). As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.
>
> * * *

> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with the right of recovery."

The Circuit Courts of Appeal have uniformly applied the principles enunciated by this Court and quoted above in cases relating to strike damages. There is no conflict. See *International Brotherhood of Teamsters, etc., Local 25 v W. L. Mead, Inc.*, 230 F.2d 576 (1 Cir. 1956); *International Union of Operating Engineers, Local 653 v. Bay City Erection Co.*, 300 F.2d 270 (5 Cir. 1962); *Lewis v. Benedict Coal Corporation*, 259 F.2d 346 (6 Cir. 1958); *United Electrical Workers v. Oliver Corp.*, 205 F.2d 276 (8 Cir. 1953); and *United Steelworkers of America v. CCI Corporation*, 395 F.2d 529, (10 Cir. 1968), *cert. den.* 393 U.S. 1019. These are all cases in which strike damages judgments were based upon reasonable estimates arrived at from relevant factors.

The factors underlying the projections or estimates used in the present case were perhaps more strongly documented and reliable than in any of the cases just cited, including sales estimates based upon sophisticated market research and actual customer commitments, and production capabilities and normal costs drawn from factual experience.

None of the cases cited by the Petitioner addresses itself to the issue of sufficiency of means employed to separate lawful and unlawful damage.

International Brotherhood of Teamsters, Local 20 v. Morton, 377 U.S. 252, simply reversed a holding that certain secondary union activity which was lawful under federal law could be actionable for damages because of state law, vacating a damages judgment admittedly assessed on account of such conduct. The case presented no problem in the area of separating damages to a single operation simultaneously caused by lawful and unlawful activities and spoke not at all to the present question.

The holding that the Petitioner attributes to this Court in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 64, that all damage suits of all kinds in all circumstances against unions are expressly and totally prohibited is, of course, grossly in error. The Court there simply limited state court remedies for libels committed in the course of labor disputes to those circulated with malice and resulting damage. The case did not speak to any issue related to separation of damages.

The Petitioner does not elaborate upon its citation of *N.L.R.B. v. Insurance Agent's International Union*, 361 U.S. 477, 496, and research suggests no clue to its applicability. At the place cited, the Court, in a case relating to the statutory duty to bargain, was discussing permissible types of economic pressure.

The Petitioner's quotation from *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 732, would appear to be of little significance. The case had to do with legal picketing set against a background of illegal violence, and the Court merely stated that otherwise legal picketing may become so afflicted with violence as to render all damages

from it recoverable due inseparability, but that recovery would be limited to damages due to the illegal conduct when separable. The Courts below and the Respondent have not quarreled with either of those propositions.

THERE IS NO LEGAL SUPPORT FOR THE ILLOGICAL PROPOSITION THAT AN UNLAWFULLY STRUCK COMPANY CAN RECOVER NONE OF FIXED COSTS RENDERED UNRECOVERABLE BY THE UNLAWFUL STRIKE IF IT CONTINUES TO OPERATE FULL TIME.

In Part II of its Reasons For Granting The Writ, the Petitioner states that three Circuit Courts of Appeal and two District Courts have consistently adhered to the principle that the measure of unabsorbed fixed costs recoverable as damages in the case of an unlawful strike is the operating time that the employer loses and not the production that he loses.

This proposition will not answer to logical analysis. If an employer could have produced 100 units per month at a given fixed cost in the absence of a strike, and if he can only produce 50 units per month at the same fixed cost due to the strike, it is most obvious that he has been damaged in terms of inability to recover fixed costs by the strike, no matter how many hours he has to run per month in order to produce the 50 units under strike conditions.

Neither do any of the cases cited by Petitioner support its contention. Indeed, two of them appear to be adversely decisive of it. In *United Electrical Workers v. Oliver Corp.*,

supra, where an unlawful strike resulted in a loss of 52½ per cent of the plant's production as compared with a representative period, recovery of fixed costs was awarded based precisely on the percentage of production lost due to the strike, and not by any reference whatever to operating time. Although unclear, it appears that the plant operated full time during the strike.

In *Union Tank Car v. General Truck Drivers*, 305 F.Supp. 1162 (E.D. La. 1970), the company lost 31% of its production, again as compared with a representative period, during the time of an illegal slowdown. The company was awarded precisely 31% of its fixed costs for the slowdown period, although it was then operating the same number of hours, and with the same number of employees, as at other times. This case emphasized the logical fallacy of the Petitioner's position, since an employer could never recover any damages for a slowdown under Petitioner's theory.

The other cases cited by Petitioner appear to have no application at all. In *Sheet Metal Workers v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5 Cir. 1967), recovery of fixed costs was denied simply because the employer lost no business due to the strike, and therefore no income, and he was otherwise compensated in damages for extra expenses, such as overtime, occasioned by the illegal strike.

United Steelworkers of America v. CCI Corporation, *supra*, says nothing on the present issue. That case involved a refusal by a part of the plant's employees to cross a picket line, and unabsorbed fixed costs were recovered. The Court said nothing as to the measure of damages if all strikers had been replaced.

Finally, *Structural Steel & Ornamental Iron Ass'n v. Shopmen's Union*, 172 F.Supp. 354 (D.C.N.J. 1959), dealt with a strike which caused a total shutdown, and the opinion says nothing as to the measure of damages in other fact situations.

The Respondent submits that the Petitioner's contention is on its face insupportable, and that it is in fact totally unsupported by any authority.

CONCLUSION

Respondent prays that the Petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing brief have been served by air mail, postage prepaid, this 31st day of December, 1973, on the following:

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